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No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CONTINENTAL AIRLINES, INC.,
Petitioner,

v.

FRED ZIMMERMAN, Trustee of
Ludwig Honold Manufacturing Co., Debtor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether Section 3 of the Federal Arbitration Act, 9 U.S.C. §3 (1976), which requires any of the courts of the United States to stay a court action pending arbitration if the suit has been brought upon any issue referable to arbitration under an agreement in writing for such arbitration, has been impliedly repealed by the Bankruptcy Reform Act of 1978, so that bankruptcy proceedings are now exempt from the otherwise mandatory commands of Section 3 of the Federal Arbitration Act?

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

CONTINENTAL AIRLINES, INC.,
Petitioner,

v.

FRED ZIMMERMAN, Trustee
of Ludwig Honold Manufacturing Co., Debtor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Continental Airlines, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 11, 1983.[1]

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1. Pursuant to Sup. Ct. R. 28.1, Petitioner hereby discloses the following subsidiaries (except wholly-owned subsidiaries) of Continental Airlines, Inc. with the percentage of stock interest held by Petitioner noted in parentheses: Air Micronesia, Inc. (30%) and United Micronesia Development Association (32%). Petitioner is itself a wholly-owned subsidiary of Continental Airlines Corporation, 91% of the voting stock of which is owned by Texas Air Corporation, which also owns 76.7% of the voting stock of New York Airlines, Inc. Jet Capital Corporation, a privately held corporation, has a controlling interest in Texas Air Corporation (10.4%).

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, which is not yet reported, appears in the Appendix hereto commencing at page A-1. The opinion of the United States Bankruptcy Court for the Eastern District of Pennsylvania, reported at 22 B.R. 436 (Bankr. E.D. Pa. 1982), appears in the Appendix commencing at page A-12.

JURISDICTION

The judgment of the Court of Appeals, which appears in the Appendix at page A-18, was entered on July 11, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

Section 3 of the United States Arbitration Act, Pub. L. No. 80-282, ch. 392, §3, 61 Stat. 669 (1947), codified at 9 U.S.C. §3 (1976), which states:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

and the jurisdictional provisions of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978), which are codified at 28 U.S.C. §§1471-1475, §1478, and §§1480-1482 (Supp. V 1981), and which are set forth in the Appendix hereto at pages A-20 to A-25.

STATEMENT OF THE CASE

A. Statement of the Facts.

During 1980, Petitioner, Continental Airlines, Inc., a California-based interstate air carrier, entered into a written "Sales Agreement" with Ludwig Honold Manufacturing Co., a Delaware-based manufacturing firm, for the purchase of four "Plane-Mate" vehicles to be manufactured by Ludwig Honold. The written Agreement was principally a standard form used by Ludwig Honold, including among the standard conditions a conventional provision requiring that any controversy with respect to the Agreement be settled by arbitration. That provision stated:

> 30. *Arbitration.* Any controversy between the parties with respect to this Agreement shall be settled by arbitration to be held in the City of Philadelphia, Pennsylvania, U.S.A. before a single arbitrator appointed by the Philadelphia office of the American Arbitration Association. The decision of the arbitrator shall be final and binding upon the parties, both as to law and to fact, and shall not be appealable to any Court in any jurisdiction. The decision of the arbitrator may be entered in any Court having jurisdiction thereof.

The same written Agreement also included a provision for "Liquidated Damages" by which the price of each Plane-Mate vehicle would be reduced by $10,000 per vehicle per day of delay beyond a specified date in 1981, with the maximum damages due to delay "not to exceed $200,000.00."

Delivery of the vehicles was delayed and, pursuant to the liquidated damages clause, Continental withheld $200,000 from the $2,124,420 purchase price.

Subsequent to all these occurrences (*i.e.*, after the signing of the written Sales Agreement, the manufacture and delayed delivery of the vehicles, and Continental's withholding of the maximum amount of liquidated damages for delay), Ludwig Honold filed in bankruptcy, and Fred Zimmerman, Respondent, was appointed trustee.

B. The Proceedings Below.

In 1982, trustee Zimmerman initiated an Adversary Proceeding in the Bankruptcy Court, by filing a Complaint which attached the written Agreement between Ludwig Honold and Continental as "Exhibit 'A,'" and sought judgment for the $200,000. The jurisdiction of the Bankruptcy Court was based upon 28 U.S.C. §1471 (Supp. V 1981). Continental timely applied for a stay of the trial of the bankruptcy adversary proceeding, pursu-

ant to Section 3 of the Federal Arbitration Act, 9 U.S.C. §3 (1976), which requires "any of the courts of the United States" to grant such a stay if the suit is upon "any issue referable to arbitration under an agreement in writing for such arbitration," the contract involves a transaction in interstate commerce and "the applicant for the stay is not in default for proceeding with such arbitration." There is no dispute that the instant agreement involves interstate commerce. Slip Opinion of the Court of Appeals at 5 (App. at A-5). It was stipulated at argument before the Bankruptcy Judge that neither party was "in default in proceeding with such arbitration."

Notwithstanding that the requirements for a stay pending arbitration had been established, the Bankruptcy Court declined to order a stay which is mandated by the Arbitration Act, stating that:

> In view of the enactment of the Bankruptcy Reform Act of 1978 and the urgent need for the prompt administration of adversary proceedings, we conclude that, in the case before us, the arbitration clause is not binding on the parties and that we may determine this case by trial rather than by arbitration.

22 B.R. at 438 (App. at A-16).

Continental filed a timely appeal, and pursuant to stipulation between the parties, the appeal was taken directly to the Court of Appeals.

After supplemental briefing on a question of appealability, the Court of Appeals concluded that the issue could be appealed directly to the Court of Appeals and was subject to review, notwithstanding the interlocutory nature of the order denying the stay pending arbitration, pursuant to *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449, 451-52 (1935) (per Brandeis, J.) (order of a district court denying stay requested under the Arbitration Act is not a final judg-

ment, but is appealable as an order refusing an interlocutory injunction).

On the merits, the Court of Appeals concluded that in light of the nature of the transaction and the text of the written agreement, Section 3 of the Arbitration Act required the trial to be stayed pending arbitration, "unless the bankruptcy court is exempt from the commands of the Arbitration Act. . . ." Slip Opinion at 5 (App. at A-5). The Court of Appeals found no "express provisions" of the Bankruptcy Reform Act which would resolve the conflict which the Court of Appeals perceived to exist between the Bankruptcy Reform Act and the Arbitration Act. However, the Court considered legislative history supporting expansion of the jurisdiction of the Bankruptcy Court, and concluded that,

> Therefore, because of the importance of bankruptcy proceedings in general, and the need for the expeditious resolution of bankruptcy matters in particular, we hold that the intentions of Congress will be better realized if the Bankruptcy Reform Act is read to impliedly modify the Arbitration Act.

Slip Opinion at 10 (App. at A-10). The Court of Appeals accordingly held that the Bankruptcy Court had the discretionary power to deny a stay pending arbitration, although no such discretion would lie in any other court of the United States.

REASONS FOR GRANTING THE WRIT

1. The decision below is in direct conflict with the decisions of another Federal Appellate Court and the lower courts of another circuit and is in conflict in principle with decisions of another circuit.

Although the Court of Appeals in the instant case believed that its conclusion was the same as "the only other federal court to address the issue at hand," citing

the opinion of the Bankruptcy Court of the Western District of Virginia in *In re Cross Electric Co.*, 9 B.R. 408 (Bankr. W.D. Va. 1981), the instant decision is in direct conflict with a decision of the Bankruptcy Appellate Panel of the Ninth Circuit, *In re Morgan*, 28 B.R. 3 (Bankr. 9th Cir. 1983), *appeal docketed*, No. 83-1818 (9th Cir. March 22, 1983). As in the instant case, the *Morgan* case involved an adversary proceeding initiated by the debtor against another party who had not made a claim against the estate. Although the debtor contended that the Bankruptcy Code favored the adjudication of claims in the bankruptcy court, the Appellate Panel concluded that when the defendant in the adversary proceeding had not made a claim against the estate and the debtor had initiated the adversary proceeding, the policy of the Arbitration Act should prevail. 28 B.R. at 5. The Appellate Panel accordingly reversed a bankruptcy court order which had enjoined the non-debtor party to the contract from seeking to enforce the arbitration clause.

Although earlier litigation in the *Morgan* case, prior to the bankruptcy filing, provided an alternative ground of decision based on *res judicata*, the holding which upholds the policy of the Arbitration Act is directly in conflict with the instant decision below.

The decision below is also in direct conflict with the decisions of lower courts of another circuit, *In re Hart Ski Manufacturing Co.*, 18 B.R. 154 (Bankr. D. Minn.), *aff'd*, 22 B.R. 763 (D. Minn. 1982) and *Barber-Greene Co. v. Zeco Co.*, 17 B.R. 248 (Bankr. D. Minn. 1982). In each of these decisions the court held that the filing of a petition under the new code does not permit a debtor to avoid its obligation to arbitrate. As the court stated in *Barber-Greene*, 17 B.R. at 250:

> [T]he federal courts, particularly since the adoption of [the Federal Arbitration Act], and the applicable state courts now look favorably upon arbitration and consistently enforce the agreements of the parties adopted to that end.

Both courts correctly held that the Federal Arbitration Act requires a Bankruptcy Court to stay its proceedings and to require arbitration of a debtor's claim against a third party. *Hart Ski*, 18 B.R. at 161; *Barber-Greene*, 17 B.R. at 250; *cf. In re Cres Rivera Concrete Co.*, 21 B.R. 155, 158 (Bankr. D.N.M. 1982) (requiring debtor to submit claims against non-creditor third-party to arbitration pursuant to the New Mexico Uniform Arbitration Act, N.M. Stat. Ann. 44-7-1 (1978)).

The decision below is also in conflict with consistent decisions under the former Act. Those decisions have recognized that arbitration could not be compelled of federally-related rights, such as violations of the anti-fraud provisions of the securities laws, or of the anti-trust laws, *see, e.g., American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 825 (2d Cir. 1968), but that arbitration was required when contract rights were at issue and a bankruptcy trustee sought to obtain his rights under such a contract. In such a case, "to obtain his rights under the contract the trustee will have to accept the entire contract, including an arbitration clause if the contract contains one." *Allegaert v. Perot*, 548 F.2d 432, 436 n.7a (2d Cir.), *cert. denied*, 432 U.S. 910 (1977), citing *Truck Drivers Local 807 v. Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976).

The instant case, in which the trustee seeks to enforce rights under a contract, is different in several material respects from the factual situation presented in *Bohack Corp., supra*, and *NLRB v. Bildisco*, 682 F.2d 72 (3d Cir. 1982), *cert. granted*, ____U.S.____, 103 S.Ct. 784, 74 L.Ed.2d 992 (1983), involving rejection by a debtor-in-possession of a collective bargaining agreement. The decision of this Court in *Bildisco* accordingly should not reach the issue presented in the instant case.

Nor does the instant case involve any of the jurisdictional matters at issue in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____U.S.____, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), although the practi-

cal effect of the decision below is to accord to the Bankruptcy Courts a discretionary power to disregard arbitration clauses, which power is denied to all Article III courts.

Finally, the decision below is also in conflict in principle with a Second Circuit decision decided under the Bankruptcy Code, *In re Petrusch*, 667 F.2d 297 (2d Cir. 1981), *cert. denied*, 456 U.S. 974 (1982). In that case, a Bankruptcy Judge erroneously concluded that the Automatic Stay section of the Bankruptcy Reform Act of 1978, 11 U.S.C. §362 (Supp. V 1981), superseded the Norris-LaGuardia Act, 29 U.S.C. §§101-115 (1976). Section 4 of that Act, 29 U.S.C. §104 (1976), uses the same descriptive formula as the Arbitration Act and provides that "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving a growing out of any labor dispute. . . ." The Court of Appeals noted that the text of the "automatic stay" provisions of the Bankruptcy Reform Act neither delineated nor excluded labor disputes or picketing from the subject matter which was within the jurisdiction of the Bankruptcy Court. The Second Circuit also noted that, "Nowhere in the legislative history of the Bankruptcy Reform Act of 1978 . . . is any reference made to the Norris-LaGuardia Act." 667 F.2d at 299-300. But unlike the Third Circuit in the instant case, the Second Circuit concluded that:

> Such omissions are to us self-evident proof that Congress never intended to supersede or transcend it, since we cannot believe the Norris-LaGuardia Act was to be superseded *sub silentio*.

667 F.2d at 300 (emphasis in the original).

The decision below is in conflict in principle with the decision in the *Petrusch* case, because the legislative history of the Bankruptcy Reform Act of 1978 is equally silent concerning any intention by Congress to supersede the Arbitration Act.

2. The decision below erroneously relies upon broad readings of the purposes of the Bankruptcy Reform Act as a basis to imply a partial repeal of the Arbitration Act and entirely disregards the detailed legislative history and the explicit amendments to other acts which are an integral part of the Bankruptcy Reform Act of 1978.

The Bankruptcy Reform Act of 1978 does not expressly repeal the Federal Arbitration Act. Any such repeal must be implied. "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). "The intention of the legislature to repeal must be 'clear and manifest.' " *Watt v. Alaska*, 451 U.S. 259, 267 (1981), *quoting United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

The decision below concedes that there is no explicit legislative history on which an implied repeal of the Arbitration Act can be based. Moreover, any conclusion that it was the intention of Congress to accomplish such a repeal should be contradicted by the unusually extensive and careful attention, as manifested by Title III of the Bankruptcy Reform Act itself, which the Congress gave to those "amendments to other acts" which were required in order to cause those other acts to be consistent with the new Bankruptcy Code. *See* Pub. L. No. 95-598, Title III, 92 Stat. 2673-2682 (1978). A review of Title III, reprinted in the Appendix at pages A-26 to A-44, establishes that the drafters of the Bankruptcy Reform Act attempted to discover each place within the entire body of extant federal legislation which required any change, and explicitly provided for each such change which was believed to be required.

Another example of the careful attention to details of the effect of the Bankruptcy Reform Act on other legislation appears in the text concerning rejection of collective bargaining agreements; Section 103(g) of the new Bankruptcy Code, Pub. L. No. 95-598, 92 Stat. 2599 (1978), 11 U.S.C. §103(g) (Supp. V 1981), distin-

guishes between agreements covering railway employees, rejection of which is extremely limited, and collective bargaining agreements covering other classes of employees.

Nor should the instant decision be justified on the basis that the Federal Arbitration Act embodies a federal policy which is not as strong as the policy of the Norris-LaGuardia Act or other federal jurisdictional statutes. This Court has held that the statutory provisions for a stay, as set forth in the Arbitration Act, manifest "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404 (1967). The consistent line of judicial decisions, prior to the instant case and the single Bankruptcy Court decision relied upon in the instant decision, recognized that the Arbitration Act required a stay when a trustee in bankruptcy sought to enforce contractual rights and the written agreement contained an arbitration clause. *See, e.g., Allegaert v. Perot*, 548 F.2d at 436 n.7a, quoted *supra* at page 8; *Schilling v. Canadian Foreign Steamship Co.*, 190 F. Supp. 462 (S.D.N.Y. 1961). Indeed, the Congressional policy in favor of arbitration of controversies had previously been recognized to be so strong[2] that

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2. This Court and the courts of appeals have consistently acknowledged the strong federal policy favoring arbitration. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, ___ U.S. ____, 103 S. Ct. 927, 941-42, 74 L. Ed. 2d 765, 785 (1983); *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1025 (11th Cir. 1982); *Schattner v. Girard, Inc.*, 668 F.2d 1366, 1369 (D.C. Cir. 1981); *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638, 643 (7th Cir. 1981); *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 43-45 (3d Cir. 1978); *Seaboard Coast Line Railroad Co. v. National Rail Passenger Corp.*, 554 F.2d 657, 660 (5th Cir. 1977); *Acevedo Maldonado v. PPG Industries, Inc.*, 514 F.2d 614, 616-17 (1st Cir. 1975); *Germany v. River Terminal Railway Co.*, 477 F.2d 546, 547 (6th Cir. 1973);

even matters which might appear to go to the heart of bankruptcy jurisdiction, such as the effect of a discharge in bankruptcy, had previously been held to be subject to arbitration, when the issue arose under a written agreement. *Fallick v. Kehr*, 369 F.2d 899 (2d Cir. 1966).

3. The issue is of recurring importance.

The written agreement in the instant case is similar to many classes of written agreements, especially for the manufacture of specific pieces of major capital equipment (such as the Plane-Mate vehicles in the instant case) or construction contracts in real estate, in which the parties have agreed, for sound business reasons, to commit the resolution of their disputes to an arbitration process, rather than to the courts. *See generally*, Angel, *The Use of Arbitration Clauses as a Means for the Resolution of Impasses Arising in the Negotiation of, or During the Life of, Long-Term Contractual Relationships*, 28 Bus. Law. 589 (1973); Coulson, *Arbitration in the Eighties: How to Make it Work for You*, 171 Forum 673, 681 (1982); Healy, *An Introduction to the Federal Arbitration Act*, 13 J. Maritime L. 223, 225 (1982); Max, *Arbitration: The Alternative to Timely, Costly Litigation*, 42 Ala. Law. 309, 311 (1981). The instant decision, contrary both to the "unmistakably clear Congressional purpose" manifest in the Arbitration Act, *Prima Paint Corp.*, *supra*, 388 U.S. at 404, and contrary to the expec-

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NOTE — *(Continued)*

Hart v. Orion Insurance Co., 453 F.2d 1358, 1360-61 (10th Cir. 1971); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1212 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972).

Recently, Justice O'Connor stressed the need to encourage "[a]lternative forms of dispute resolutions." *See* Address by Justice O'Connor to the Joint Meeting of the Fellows of the American Bar Foundation and the National Counsel of Bar Presidents (Feb. 6, 1983) (available in the Library of the Supreme Court of the United States). Justice Burger has expressed similar sentiments. *See* Burger, *Isn't There A Better Way?*, 68 A.B.A.J. 274 (1982).

tations of the parties, makes that system of arbitration depend upon whether one party to the written agreement is in financial difficulty.

Cases similar to the instant situation have already occurred in a number of reported decisions and are bound to recur. Even absent the conflict between the appellate decisions, the conflict perceived to exist between the Congressional policy of the Arbitration Act and the implied intent discerned in the enactment of the Bankruptcy Reform Act is a conflict which should be resolved by this Court.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1639

FRED ZIMMERMAN, TRUSTEE OF
LUDWIG HONOLD MFG. CO.

vs.

CONTINENTAL AIRLINES, INC.,

Appellant

APPEAL FROM THE UNITED STATES BANKRUPTCY
COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Bankruptcy Court No. 81-04610)

Bankruptcy Judge: The Honorable Emil F. Goldhaber

Argued April 12, 1983

Before: HUNTER and HIGGINBOTHAM, *Circuit Judges*,
and GERRY, *District Judge**

(Filed July 11, 1983)

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* Honorable John F. Gerry, of the United States District Court for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*.

This appeal requires us to reconcile two contradictory federal policies. The first is embodied in the United States Arbitration Act. Act of July 30, 1947, Pub. L. No. 80-282, c. 392, §1, 61 Stat. 669 (codified at 9 U.S.C. §§1-208). This act requires a federal court to stay proceedings pending arbitration if issues pertinent to the dispute are also the subject of an arbitration agreement between the parties, thereby reflecting Congress' intent to encourage both arbitration and the enforcement of contractual obligations. The competing policy is embodied in the Bankruptcy Reform Act of 1978. Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549. This Act significantly expands the jurisdiction of bankruptcy courts and is based on the notion that to protect the positions of both the bankrupt and its creditors, bankruptcy actions should not be subject to unnecessary delay and all claims and issues relevant to such actions should be resolved in one expeditious proceeding. A conflict arises when, as in the instant case, the debtor in a bankruptcy action sues on a contract and the defendant demands a stay of the bankruptcy proceeding pending contractually agreed to arbitration. Today we hold that because the underlying purposes of the Bankruptcy Reform Act impliedly modify the Arbitration Act, the granting of a stay pending arbitration, even when the arbitration clause is contractual, is a matter left to the sound discretion of the bankruptcy judge. Finding no abuse of discretion here, we affirm the order of the court below.

I.

In 1981, the Ludwig Honold Manufacturing Company went into bankruptcy and Fred Zimmerman, appellee, was appointed trustee. Prior to that time, Ludwig Honold had agreed to supply Continental Airlines, Inc., appellant, with four plane-mate vehicles. The contract for this transaction provided that if there were any delays in delivery, Continental could get "liquidated damages" amounting to $10,000 per vehicle per day of delay, up to $200,000. The contract also contained an arbitration clause declaring that "[a]ny controversy between the parties with respect to this agreement shall be settled by arbitration . . . [and that t]he decision of the arbitrator shall be final and binding . . . ." App. at 15a.

There was a delivery delay and, pursuant to the liquidated damages clause, Continental withheld $200,000 of its payment on the contract. After Ludwig Honold went into bankruptcy, trustee Zimmerman initiated these adversary proceedings against Continental in the bankruptcy court alleging that Continental's claim to the liquidated damages was improper. Continental applied for a stay of the bankruptcy proceedings under the Arbitration Act, 9 U.S.C. §3, so that the contract dispute could be resolved by arbitration. The bankruptcy court declined to enter the stay, reasoning that:

> In view of the enactment of the Bankruptcy Reform Act of 1978 and the urgent need for the prompt administration of adversary proceedings, we conclude that, in the case before us, the arbitration clause is not binding on the parties and that we may determine this case by trial rather than by arbitration.

App. at 37a. Continental now appeals that ruling.[1]

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1. This is a direct appeal, by agreement of the parties, from the bankruptcy court to the court of appeals. 28 U.S.C. §1293(b). Initially there was some question as to whether the order appealed from, *i.e.*, the denial of a request for a stay, was final or interlocutory

II.

The stay provisions of §3 of the Arbitration Act[2] "apply only to the two kinds of contracts specified in §§1 and 2 of the Act, namely those in admiralty or

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NOTE — *(Continued)*
and, if the latter, whether it was appealable under §1293(b). All such uncertainties were resolved in favor of appealability by *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, No. 82-5391 (3d Cir. May 17, 1983).

In *Coastal Steel*, plaintiff, an American company, contracted with an English corporation for the construction of a manufacturing plant to be built in New Jersey. The contract provided that all disputes would be resolved by English courts under English law. Disputes arose and, after filing for bankruptcy, plaintiff began adversary proceedings against defendants under the contract. Defendant Tilghman moved to dismiss, citing, *inter alia*, the forum selection clause. Defendant Wheelabrator joined. The bankruptcy court denied the motion and both defendants appealed. Plaintiff argued before us that under 28 U.S.C. §1293, our jurisdiction was limited to review of *final* orders from bankruptcy courts and that jurisdiction was absent here because the denial of a motion to dismiss is not a final order. In accepting the appeal, however, we reasoned that after *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ___ U.S. ___, 102 S.Ct. 2858 (1982), 28 U.S.C. §1293 was no longer operational and, therefore, 28 U.S.C. §1292 governed the issue of appellate jurisdiction. We concluded that the case met the appealability requirements of §1292.

Coastal Steel is controlling in the instant suit because

> [a] motion to dismiss an action in order to give effect to a forum selection clause is in practical effect an application for specific performance of that contractual provision. It is analytically indistinguishable from a motion to stay an action at law pending arbitration. Grants or denials of such orders are reviewable under section 1292(a)(1). *Shankeroke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1935)
>
> . . . .

Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., No. 82-5391, slip op. at 6 (3d Cir. May 17, 1983).

2. This section provides that:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which

evidencing transactions in 'commerce.' " *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 401 (1967). We have no trouble in concluding that a contract for plane-related equipment between Ludwig Honold, a Delaware-based manufacturing firm, and Continental, a California-based interstate air carrier, is a contract evidencing a transaction in commerce. Thus, §3 applies to this case and, unless the bankruptcy court is exempt from the commands of the Arbitration Act, that court's duty is clear: "Section 3 *requires* a federal court in which suit has been brought 'upon any issue referable to arbitration under an agreement in writing for such arbitration' to stay the court action pending arbitration . . . ." *Id.* at 400 (emphasis added). The court below concluded, however, that the Bankruptcy Reform Act impliedly modified the Arbitration Act and thereby exempted bankruptcy proceedings from the otherwise mandatory commands of §3. Because this decision involves the choice and application of a legal precept, our review is plenary. *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98 (3d Cir. 1981).

As the express provisions of the two federal acts create, but do not dispose of, the present jurisdictional conflict, we must look beyond the statutes themselves, to their underlying purposes and goals, to resolve the controversy. We turn first to the Arbitration Act.

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such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. §3.

A.

At the outset, we recognize that there is a strong federal policy favoring arbitration as an alternative dispute resolution process. *Demsey & Associates, Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1017 (2d Cir. 1972). The Arbitration Act gives effect to an additional federal policy favoring enforcement of contractual obligations. As the Supreme Court has noted, the underlying consideration behind requiring stays of proceedings pending arbitration is "the unmistakably clear congressional purpose [in enacting the Arbitration Act] that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp.*, 388 U.S. at 404 and 404 n.12.

B.

These policies must be juxtaposed with those embodied in the broad jurisdictional provisions of the Bankruptcy Reform Act of 1978. The basic jurisdictional grant for bankruptcy courts is contained in 28 U.S.C. §1471.[3] That section represents an expansion of juris-

3. Section 1471 of title 28 provides:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

diction from the previous bankruptcy laws. *See In re Brothers Coal Co., Inc.*, 6 B.R. 567, 570 (Bankr.W.D.Va. 1980). To supplement this section, Congress further provided the bankruptcy courts with specific statutory authority covering venue under 28 U.S.C. §§1472-1475, jury trials under §1480, appeal rights under §1482, and removal under §1478. To complete the jurisdictional picture, §1481 states that the bankruptcy courts "shall have the powers of a court of equity, law, and admiralty. . . ."

The reason for this expansion in jurisdiction is explained in the Senate Report on the Bankruptcy Reform Act: "A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction. . . ." S. Rep. No. 95-989, 95 Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5803. While the reduction of unnecessary delays, expenses, and duplications of effort are important in all judicial proceedings, they are especially important in bankruptcy cases. The economic fragility of the bankrupt's estate, the excess of creditors' demands over debtor's assets, and the goal of rehabilitating the debtor all argue for expeditious resolution of the bankruptcy proceeding.

The dichotomy between summary and plenary jurisdiction present in the former bankruptcy laws worked against expeditious resolution of bankruptcy actions be-

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NOTE — *(Continued)*

Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

28 U.S.C. §1471.

cause it often necessitated two essentially identical proceedings. The first, in the bankruptcy court, was needed to determine if that court had sufficient jurisdiction to resolve the dispute. If it did not, then a second proceeding would have to be started in either the state or federal district court system to resolve the controversy on the merits. The Senate Report noted that, "the liquidation of bankrupt estates and the rehabilitation of debtors" were both prejudiced by this system. *Id.* at 5804.

The House Report reiterated the need for expanded jurisdiction in the bankruptcy court. *See, e.g.*, H. Rep. No. 95-595, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6007. This Report further stated that, as a result of the increased jurisdiction, "all matters and proceedings that arose in connection with bankruptcy cases" may now be tried in one action before the bankruptcy court. *Id.* at 6010.

The dictates of the Arbitration Act, requiring stays of proceedings pending arbitration, could result in delays, expenses, and duplications similar to those previously experienced in bankruptcy proceedings because of the dichotomy between plenary and summary jurisdiction. Clearly a mandatory stay of a bankruptcy proceeding delays that proceeding. Also, since issues relating to the relationship between debtor and creditor might well be the subject of both the bankruptcy and the arbitration proceedings, duplication of adversarial effort, with a resulting increase in expense, would likely occur. Therefore, the policies underlying the expansion of bankruptcy court jurisdiction embodied in the Bankruptcy Reform Act may be relied on to resolve the conflict in the instant case.

C.

Despite the breadth of the language of §3 of the Arbitration Act, and the importance of that Act's policy underpinnings, we note that certain types of actions

have been held exempt from its commands. In *Wilko v. Swan*, 346 U.S. 427 (1953), for example, the Court held that in a proceeding brought under the Securities Act of 1933, the stay provisions of the Arbitration Act were not mandatory.[4] In so holding, the Court recognized that the Arbitration Act was intended to allow agreeing parties to "avoid[ ] the delay and expense of litigation. . . ." *Id.* at 431. The court found, however, that this purpose conflicted with §14 of the Securities Act, which declared void any "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision" of the Securities Act. 15 U.S.C. §77n. The conflict arose because the Court found that the "[contractual agreement] to arbitrate is a 'stipulation,' and we think that the right to select the judicial forum is the kind of 'provision' that cannot be waived under §14 of the Securities Act." 346 U.S. at 434-35. In resolving the conflict in favor of the Securities Act, the Court stated that:

> Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by

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4. *See also American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), holding that certain antitrust actions are exempt from 9 U.S.C. §3.

> holding invalid such an agreement for arbitration of issues arising under the Act.

Id. at 438.

In the instant case, as in *Wilko*, the competing policies, both representing important congressional concerns, are not easily reconcilable. They are both equally specific and focused and in giving a preference for either, the effectiveness of the other will be proportionally diluted. Bankruptcy proceedings, however, have long held a special place in the federal judicial system. Because of their importance to the smooth functioning of the nation's commercial activities, they are one of the few areas where Congress has expressly preempted state court jurisdiction. *See* 28 U.S.C. §1334. While the sanctity of arbitration is a fundamental federal concern, it cannot be said to occupy a position of similar importance. Therefore, because of the importance of bankruptcy proceedings in general, and the need for the expeditious resolution of bankruptcy matters in particular, we hold that the intentions of Congress will be better realized if the Bankruptcy Reform Act is read to impliedly modify the Arbitration Act. Thus, while a bankruptcy court would have the power to stay proceedings pending arbitration, the use of this power is left to the sound discretion of the bankruptcy court.[5]

III.

Thus, reversal in the instant case depends on a finding that the bankruptcy court below abused its discretion in denying the requested stay. A lower federal tribunal abuses its discretion in refusing to grant applications such as that present here only when its action is arbi-

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5. The only other federal court to address the issue at hand, *i.e.*, the interrelationship between the Arbitration Act and the Bankruptcy Reform Act, reached the same conclusion. *See In re Cross Electronic Co.*, 9 B.R. 408 (Bankr.W.D.Va. 1981).

trary, fanciful, or unreasonable. *Evans v. Buchanan*, 555 F.2d 373 (3d Cir. 1977). Considering the policies underlying the new bankruptcy code and the importance of the resolution of disputes to the underlying bankruptcy proceeding, we find no abuse of discretion here.

IV.

The order of the bankruptcy court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 11
LUDWIG HONOLD MANUFACTURING COMPANY	:	
Debtor	:	Bankruptcy No. 81-04610G
FRED ZIMMERMAN, Trustee of Ludwig Honold Mfg. Co.	:	
Plaintiff	:	
v.	:	
CONTINENTAL AIRLINES, INC.	:	Adversary No. 82-1046G
Defendant	:	

OPINION

By EMIL F. GOLDHABER, Bankruptcy Judge:

The issue at bench is whether the debtor, Ludwig Honold Manufacturing Company, is compelled to proceed with arbitration in accordance with an arbitration clause in a contract between it and the defendant, Continental Airlines, Inc., when the debtor seeks to recover on a contract made between the debtor and the defendant. We conclude that arbitration is not mandatory and we will not, accordingly, grant defendant's application for a stay pending arbitration.

The facts of this case are as follows:[1] Ludwig Honold Manufacturing Company ("the debtor") entered into a contract with Continental Airlines, Inc. ("Continental") whereby the debtor agreed to manufacture for Continental four plane mates. The debtor completed the plane mates, delivered them to Continental, and de-

1. This opinion constitutes the findings of fact and conclusions of law required by Rule 752 of the Bankruptcy Procedure.

manded the balance of the contract price which Continental refused to pay.

On November 11, 1981, an involuntary petition in bankruptcy was filed against the debtor and a trustee was appointed who demanded payment for the contract balance.

The contract between the debtor and Continental contained a clause requiring the parties to arbitrate all controversies arising under the agreement. The clause provides:

> 30. *Arbitration.* Any controversy between the parties with respect to this Agreement shall be settled by arbitration to be held in the City of Philadelphia, Pennsylvania, U.S.A. before a single arbitrator appointed by the Philadelphia Office of the American Arbitration Association. The decision of the arbitrator shall be final and binding upon the parties, both as to law and to fact, and shall not be appealable to any Court in any jurisdiction. The decision of the arbitrator may be entered in any Court having jurisdiction thereof.

Continental has asserted this arbitration provision and requests a stay of litigation until all disputes are resolved by arbitration.

The decision to compel or deny arbitration is discretionary with the bankruptcy judge: *In the Matter of Muskegon Motor Specialties Company v. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, and Its Local 1272, et al.*, 313 F.2d 841, 842 (6th Cir. 1963); and a court which does not compel arbitration where the determination in such a proceeding would affect the amount, existence, and priority of claims to be paid out of the general funds and thus, involve the interests of creditors, does not abuse its discretion: *In the Matter of Muskegon, supra* at 843; *Johnson v. England*, 356 F.2d 44, 52 (9th Cir. 1966); *Bohack Corporation v. Truck Drivers' Local Union No. 807*, 431 F. Supp. 646, 653 (E.D.N.Y. 1977) *cert. denied*, 439 U.S. 825, 99 S. Ct. 95,

58 L. Ed. 2d 117 (1978). *See also*, Krundler, *The Convergence of Arbitration and Bankruptcy*, 26 Arb. J. 34 (1971).

In the case of *Cross Electric Company v. John Driggs Company, Inc.*, 9 B.R. 408 (W.D. Va. 1981), the United States Bankruptcy Court for the Western District of Virginia was presented with essentially the same issue as confronts us in the case before us. In *Cross*, the debtor, prior to filing its chapter 11 petition, entered into a contract with the defendant, Driggs. This contract contained an arbitration clause. After the debtor commenced its action in the bankruptcy court, the defendant filed a motion to dismiss on the premise that the bankruptcy court did not have jurisdiction over the matter because the parties failed to arbitrate.

The court in *Cross* reviewed cases decided under the former Bankruptcy Act and determined that they were inapplicable because of the enactment of the Bankruptcy Code.[2] The court also considered the public interest, the nature of the evidence, the right and need for pre-trial discovery, the preferable judicial forum, and the need for expedient and prompt adjudication in the determination of disputes arising out of cases before the bankruptcy court. In so doing, the court determined that the congressional intent in the enactment of the Bankruptcy Code and the considerations as set forth above dictated the conclusion that the debtor was not required to proceed with arbitration.[3] Therefore, the court denied the defendant's motion to dismiss.

In reaching its conclusion, the court in *Cross* analyzed the congressional policy as expressed in 28 U.S.C. 1471 through 1481[4] and determined that Congress intended to ensure the expeditious and orderly processing

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2. Those cases include *Schilling v. Canadian Steamship Co., Ltd.*, 190 F. Supp. 462 (S.D.N.Y. 1961) and *America Safety and Equipment Company v. J. P. McGuire and Company*, 391 F.2d 821 (2d Cir. 1968).

3. 9 B. R. at 412.

4. *See* 1 Collier on Bankruptcy, §3.01 (15th Ed.).

of cases pending before the bankruptcy court as well as cases pending elsewhere coming within a bankruptcy court's jurisdiction. The court then determined that relegating the complaint to protracted arbitration proceedings where rules of discovery may not be available to the parties could prolong indefinitely a decision in this matter. As a result, the court concluded that *it* could expeditiously hear and determine the issues raised by the debtor and therefore, it was the proper forum to hear matters relating to the case.

Continental urges us not to follow the *Cross* decision and contends that the rights claimed by it in the instant case are rights which would exist in an action commenced in the District Court and that the broadening of the bankruptcy court's jurisdiction does not purport to affect those rights. Although we are influenced, as stated in *Schilling, supra*, that:

> The right of a party to a contract to resort to arbitration provided for in that contract is as much a contract right as is the right to payment. It is such an important question whether the contract containing the arbitration was obtained by fraud must be decided by the arbitrators, 190 F. Supp. at 463,

we find that the effective and prompt resolution and administration of issues relating to and arising out of a bankruptcy proceeding as the controlling factors in our decision. Congress enacted 28 U.S.C. §1471 with the intention of ensuring prompt administration of the bankrupt estate and with at least the minimum requirement of judicial review of the possible prejudice arbitration can have to the bankrupt estate.[5] As a result, we are impelled to follow the holding in *Cross*.

The debtor asserts that submission to arbitration would only frustrate one of the goals of the Bankruptcy Reform Act, *i.e.*, the prompt administration of bank-

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5. *See* 9 Bkr. L. Ed. §82:22; *See also In re Brothers Coal-Westinghouse v. Yeary*, (Bkrtcy. W.D. Va. 1980) 6 B.C.D. 1066, 3 C.D.C. 2d 31, 6 B.R. 567.

ruptcy proceedings. We agree. A perusal of the Rules for Commercial Arbitration of the American Arbitration Association discloses that there were no provisions for discovery. Considering the fact that the debtor is no longer operating, the trustee's ability to obtain discovery is essential. The debtor's efforts to obtain discovery of the relevant facts could be greatly delayed by the need to file repetitive motions and to obtain decisions with requests for discovery.

Moreover, we do not see the need for an arbitrator's special expertise to the decision-making process in this case.[6] And, we find that the resolution of the issues in dispute are of particular interest to the bankruptcy court.

In view of the enactment of the Bankruptcy Reform Act of 1978 and the urgent need for the prompt administration of adversary proceedings, we conclude that, in the case before us, the arbitration clause is not binding on the parties and that we may determine this case by trial rather than by arbitration.

August 16, 1982

6. *See In re F. and T. Contractors, Inc.*, 649 F.2d 1229 (6th Cir. 1981); *Bohack Corporation v. Truck Union Drivers' Local Union No. 807*, 431 F. Supp. 646 (E.D.N.Y. 1977) *cert. denied*, 439 U.S. 825, 99 S. Ct. 95, 58 L. Ed. 2d 117 (1978).

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 11
	:	
LUDWIG HONOLD MANUFACTURING COMPANY	:	
	:	
Debtor	:	Bankruptcy
	:	No. 81-04610G
FRED ZIMMERMAN, Trustee of Ludwig Honold Mfg. Co.	:	
	:	
	:	
Plaintiff	:	
v.	:	
	:	
CONTINENTAL AIRLINES, INC.	:	
	:	Adversary
Defendant	:	No. 82-1046G

ORDER

AND NOW, this 16th day of August, 1982, it is

ORDERED that the Application of Continental Airlines, Inc. for a Stay Pending Arbitration is DENIED; and it is further

ORDERED that a trial of this adversary proceeding be scheduled for September 17, 1982, at 10:00 A.M. in Court Room #1, (Room 3714) U.S. Court House, 601 Market Street, Philadelphia, Pa.

EMIL F. GOLDHABER
Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1639

FRED ZIMMERMAN TRUSTEE OF
LUDWIG HONOLD MFG. CO.

v.

CONTINENTAL AIRLINES, INC.
7300 WORLD WAY WEST
LOS ANGELES, CA 90009
Continental Airlines, Inc.,

Appellant

(D.C. Bky. No. 81-04610)

On Appeal From The United States Bankruptcy Court
for the Eastern District of Pennsylvania

Present: HUNTER and HIGGINBOTHAM, *Circuit Judges*;
and GERRY, *District Judge* *

JUDGMENT

This cause came on to be heard on the record from the United States Bankruptcy Court for the Eastern District of Pennsylvania and was argued by counsel on April 12, 1983.

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* Honorable John F. Gerry of the United States District Court for the District of New Jersey, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said Bankruptcy Court, entered August 16, 1982, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

Chief Deputy Clerk

July 11, 1983

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1471 (Supp. V 1981).

§1471. Jurisdiction

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, whereever[1] located, of the debtor, as of the commencement of such case. (Added Pub.L. 95-598, Title II, §241(a), Nov. 6, 1978, 92 Stat. 2668.)

28 U.S.C. §1472 (Supp. V 1981).

§1472. Venue of cases under title 11

Except as provided in section 1474 of this title, a case under title 11 may be commenced in the bankruptcy court for a district—

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1. So in original.

(1) in which the domicile, residence, principal place of business, in the United States, or principal assets, in the United States, of the person or entity that is the subject of such case have been located for the 180 days immediately preceding such commencement, or for a longer portion of such 180-day period than the domicile, residence, principal place of business, in the United States, or principle[1] assets, in the United States, of such person were located in any other district; or

(2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

(Added Pub.L. 95-598, Title II, §241(a), Nov. 6, 1978, 92 Stat. 2669.)

28 U.S.C. §1473 (Supp. V 1981).

§1473. Venue of proceedings arising under or related to cases under title 11

(a) Except as provided in subsections (b) and (d) of this section, a proceeding arising in or related to a case under title 11 may be commenced in the bankruptcy court in which such case is pending.

(b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than $1,000 or a consumer debt of less than $5,000 only in the bankruptcy court for the district in which a defendant resides.

(c) Except as provided in section (b) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case as statutory successor to the debtor or creditors under section 541 or 544(b) of title 11 in the bankruptcy court for the district where the State or Federal court sits in which, under applicable

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1. So in original. Probably should be "principal".

nonbankruptcy venue provisions, the debtor or creditors, as the case may be, may have commenced an action on which such proceeding is based if the case under title 11 had not been commenced.

(d) A trustee may commence a proceeding arising under title 11 or arising in or related to a case under title 11 based on a claim arising after the commencement of such case from the operation of the business of the debtor only in the bankruptcy court for the district where a State or Federal court sits in which, under applicable nonbankruptcy venue provisions, an action on such claim may have been brought.

(e) A proceeding arising in or related to a case under title 11, based on a claim arising after the commencement of such case from the operation of the business of the debtor, may be commenced against the representative of the estate in such case in the bankruptcy court for the district where the State or Federal court sits in which the party commencing such proceeding may, under applicable nonbankruptcy venue provisions, have brought an action on such claim, or in the bankruptcy court in which such case in[1] pending.

(Added Pub.L. 95-598, Title II, §241(a), Nov. 6, 1978, 92 Stat. 2669.)

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1. So in original. Probably should be "is".

28 U.S.C. §1474 (Supp. V 1981).

§1474. Venue of cases ancillary to foreign proceedings

(a) A case under section 304 of title 11 to enjoin the commencement or continuation of an action or proceeding in a State or Federal court, or the enforcement of a judgment, may be commenced only in the bankruptcy court for the district where the State or Federal court sits in which is pending the action or proceeding against which the injunction is sought.

(b) A case under section 304 of title 11 to enjoin the enforcement of a lien against property, or to require turnover of property of an estate, may be commenced only in the bankruptcy court for the district in which such property is found.

(c) A case under section 304 of title 11, other than a case specified in subsection (a) or (b) of this section, may be commenced only in the bankruptcy court for the district in which is located the principal assets in the United States, of the estate that is the subject of such case.

(Added Pub.L. 95-598, Title II, §241(a), Nov. 6, 1978, 92 Stat. 2670.)

28 U.S.C. §1475 (Supp. V 1981).

§1475. Change of venue

A bankruptcy court may transfer a case under title 11 or a proceeding arising under or related to such a case to a bankruptcy court for another district, in the interest of justice and for the convenience of the parties.

(Added Pub.L. 95-598, Title II, §241(a), Nov. 6, 1978, 92 Stat. 2670.)

28 U.S.C. §1478 (Supp. V 1981).

§1478. Removal to the bankruptcy courts

(a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by

a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

(Added Pub.L. 95-598, Title II, §241(a), Nov. 6, 1978, 92 Stat. 2670.)

28 U.S.C. §1480 (Supp. V 1981).

§1480. Jury trials

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.

(b) The bankruptcy court may order the issues arising under section 303 of title 11 to be tried without a jury.

(Added Pub.L. 95-598, Title II, §241(a), Nov. 6, 1978, 92 Stat. 2671.)

28 U.S.C. §1481 (Supp. V 1981).

§1481. Powers of bankruptcy court

A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment.

(Added Pub.L. 95-598, Title II, §241(a), Nov. 6, 1978, 92 Stat. 2671.)

28 U.S.C. §1482 (Supp. V 1981).

§1482. Appeals

(a) Panels designated under section 160(a) of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.

(b) Panels designated under section 160(a) of this title shall have jurisdiction of appeals from interlocutory judgments, orders, and decrees of bankruptcy courts, but only by leave of the panel to which the appeal is taken.

(Added Pub.L. 95-598, Title II, §241(a), Nov. 6, 1978, 92 Stat. 2671.)

Public Law No. 95-598, Title III, 92 Stat. 2673-2682 (1978).

TITLE III—AMENDMENTS TO OTHER ACTS

Sec. 301. Section 225(f)(C) of the Federal Salary Act of 1967 (2 U.S.C. 356(C)) is amended—

(1) by striking out "sections 402(d) and" and inserting "section" in lieu thereof; and

(2) by inserting "and magistrates" immediately before the semicolon.

Sec. 302. The Commodity Exchange Act (7 U.S.C. 1 *et seq.*) is amended by adding at the end thereof the following:

"Sec. 19. (a) Notwithstanding title 11 of the United States Code, the Commission may provide, with respect to a commodity broker that is a debtor under chapter 7 of title 11 of the United States Code, by rule or regulation—

"(1) that certain cash, securities, other property, or commodity contracts are to be included in or excluded from customer property or member property;

"(2) that certain cash, securities, other property, or commodity contracts are to be specifically identifiable to a particular customer in a specific capacity;

"(3) the method by which the business of such commodity broker is to be conducted or liquidated after the date of the filing of the petition under such chapter;

"(4) any persons to which customer property and commodity contracts may be transferred under section 766 of title 11 of the United States Code; and

"(5) how the net equity of a customer is to be determined.

"(b) As used in this section, the terms 'commodity broker', 'commodity contract', 'customer',

'customer property', 'member property', 'net equity', and 'security' have the meanings assigned such terms for the purposes of subchapter IV of chapter 7 of title 11 of the United States Code.".

Sec. 303. (a) Subsection (a) of section 4 of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499d(a)), is amended by inserting ", unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination" immediately after "bankrupt".

(b) Subsection (e) of section 4 of such Act (7 U.S.C. 499d(e)) is amended by inserting "and if he finds that the circumstances of such bankruptcy warrant such a refusal," immediately after "corporation adjudicated or discharged as a bankrupt,".

Sec. 304. Section 21(a) of the Agricultural Adjustment Act (7 U.S.C. 623(a)) is amended—

(1) by striking out "receivership, and bankruptcy" and inserting "and receivership" in lieu thereof; and

(2) by striking out "bankruptcy," in the second sentence.

Sec. 305. The first section of the Act entitled "An Act to authorize the Secretary of Agriculture to compromise, adjust, or cancel certain indebtedness, and for other purposes." approved December 20, 1944 (58 Stat. 836; 12 U.S.C. 1150), is amended by striking out "Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' " and inserting "Bankruptcy Act or under title 11 of the United States Code" in lieu thereof.

Sec. 306. (a) Section 3(a)(7) of the Securities Act of 1933 (15 U.S.C. 77c(a)(7)) is amended by striking out "in bankruptcy" and inserting "or debtor in possession in a case under title 11 of the United States Code" in lieu thereof.

(b) Paragraphs (9) and (10) of section 3(a) of such Act (15 U.S.C. 77c(a)(9) and (10)) are each amended by striking out "Any" and inserting in lieu thereof the following: "Except with respect to a security exchanged in a case under title 11 of the United States Code, any".

Sec. 307. Section 303(18) of the Trust Indenture Act of 1939 (15 U.S.C. 77ccc(18)) is amended by striking out "Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, as amended, whether amended prior to or after the enactment of this title" and inserting "Bankruptcy Act or title 11 of the United States Code" in lieu thereof.

Sec. 308. (a) Section 5(b)(1)(A) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(b)(1)) is amended—

(1) by striking out "the Bankruptcy Act" and inserting "section 101 of title 11 of the United States Code" in lieu thereof;

(2) by striking out subparagraph (B) thereof; and

(3) by redesignating subparagraphs (C), (D) and (E) as subparagraphs (B), (C), and (D), respectively.

(b) Section 5(b)(2)(A)(iii) of such Act (15 U.S.C. 78eee(b)(2)(A)(iii)) is amended by striking out "bankruptcy by the Bankruptcy Act" and inserting "the United States having jurisdiction over cases under title 11 of the United States Code" in lieu thereof.

(c) Section 5(b)(2)(B)(iii) of such Act (15 U.S.C. 78eee(b)(2)(B)(iii)) is amended by striking out ", the right of setoff provided in section 68 of the Bankruptcy Act, and" and inserting in lieu thereof "any right of setoff, except to the extent such right may be affected under section 553 of title 11 of the United States Code, and shall not abrogate".

(d) Section 5(b)(3) of such Act (15 U.S.C. 78eee(b)(3)) is amended by striking out "the applicable provisions of the Bankruptcy Act" and inserting "section 322 of title 11 of the United States Code" in lieu thereof.

(e) Section 5(b) of such Act (15 U.S.C. 78eee(b)) is amended by striking out paragraph (4) thereof and inserting in lieu thereof the following:

"(4) REMOVAL TO BANKRUPTCY COURT.—Upon the issuance of a protective decree and appointment of a trustee, or a trustee and counsel, under this section, the court shall forthwith order the removal of the entire liquidation proceeding to the court of the United States in the same judicial district having jurisdiction over cases under title 11 of the United States Code. The latter court shall thereupon have all of the jurisdiction, powers, and duties conferred by this Act upon the court to which application for the issuance of the protective decree was made.".

(f) Section 5(b)(5) of such Act (15 U.S.C. 78eee(b)(5)) is amended—

(1) by striking out subparagraph (B);

(2) by striking out "the Bankruptcy Act governing applications for allowances under such Act" in subparagraph (C) and inserting "title 11 of the United States Code governing applications for allowances under such title";

(3) by striking out "C" in subparagraph (D) and inserting "(B)" in lieu thereof;

(4) by striking out "the Bankruptcy Act" in subparagraph (E) and inserting "section 504 of title 11 of the United States Code" in lieu thereof; and

(5) by redesignating subparagraphs (C), (D), (E), and (F) as subparagraphs (B), (C), (D), and (E), respectively.

(g) Section 6(b) of such Act (15 U.S.C. 78fff(b)) is amended—

(1) by striking out ", the Bankruptcy Act." and all that follows through the end of subsection (b), and inserting in lieu thereof "chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11 of the United States Code. For the purposes of applying such title in carrying out this section, a reference in such title to the date of the filing of the petition shall be deemed to be a reference to the filing date under this Act."; and

(2) by striking out "Application of Bankruptcy Act" and inserting "Application of Title 11 of the United States Code" in lieu thereof.

(h) Section 6(e) of such Act (15 U.S.C. 78fff(e)) is amended—

(1) by striking out "in the Bankruptcy Act" and inserting "in section 726 of title 11 of the United States Code" in lieu thereof; and

(2) by striking out "as a first priority under the Bankruptcy Act" and inserting "under section 507(a)(1) of title 11 of the United States Code" in lieu thereof.

(i) Section 7(a) of such Act (15 U.S.C. 78fff-1(a)) is amended by striking out "bankruptcy under the Bankruptcy Act has with respect to a bankrupt and the property of a bankrupt" and inserting "a case under title 11 of the United States Code" in lieu thereof.

(j) Section 7(b) of such Act (15 U.S.C. 78fff-1(b)) is amended by striking out "in bankruptcy" and inserting "in a case under chapter 7 of title 11 of the United States Code, including, if the debtor is a commodity broker, as defined under section 101 of such title, the duties specified in subchapter IV of such chapter 7," in lieu thereof.

(k) Section 7(c) of such Act (15 U.S.C. 78fff-1(c)) is amended by striking out "by the Bankruptcy Act" and inserting "of a trustee in a case under chapter 7 of title 11 of the United States Code" in lieu thereof.

(l) Section 8(a)(1) of such Act (15 U.S.C. 78fff-2(a)(1)) is amended by striking out "the Bankruptcy Act" and inserting "title 11 of the United States Code" in lieu thereof.

(m) Section 8(c)(3) of such Act (15 U.S.C. 78fff-2(c)(3)) is amended by striking out "the Bankruptcy Act" and inserting "title 11 of the United States Code" in lieu thereof.

(n) Section 10(e) of such Act (15 U.S.C. 78fff-4(e)) is amended—

(1) by striking out "Jurisdiction of District Courts" and inserting "Jurisdiction of Bankruptcy Courts" in lieu thereof;

(2) by striking out "district courts of the United States" and inserting "courts of the United States having jurisdiction over cases under title 11 of the United States Code" in lieu thereof; and

(3) by striking out ", without regard to the citizenship of the parties or the amount in the controversy".

(o) Section 16 of such Act (15 U.S.C. 78lll) is amended—

(1) by striking out paragraph (1) thereof;

(2) by striking out paragraph (8)(A) thereof and inserting in lieu thereof the following:

"(A) if a petition under title 11 of the United States Code concerning the debtor was filed before such date, the term 'filing date' means the date on which such petition was filed;" and

(3) by redesignating paragraphs (2) through (15) thereof as paragraphs (1) through (14), respectively.

Sec. 309. Section 11(f) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79k(f)) is amended by striking out "bankruptcy" and inserting "a case under title 11 of the United States Code" in lieu thereof.

Sec. 310. (a) Section 2(a)(8) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(8)) is amended by striking out "bankruptcy" and inserting "a case under title 11 of the "Unitde[1] States Code" in lieu thereof.

(b) Section 6(a)(2) of such Act (15 U.S.C. 80a-6(a)(2)) is amended by striking out "bankruptcy" and inserting "a case under title 11 of the United States Code" in lieu thereof.

(c) Section 25(d) of such Act (15 U.S.C. 80a-25(d)) is amended by striking out "the Bankruptcy Act of 1898, as amended" and inserting "title 11 of the United States Code" in lieu thereof.

Sec. 311. Section 202(a)(5) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(5)) is amended by striking out "bankruptcy" and inserting "a case under title 11 of the United States Code" in lieu thereof.

Sec. 312. (a) Section 303(b)(1)(B) of the Consumer Credit Protection Act (15 U.S.C. 1673(b)(1)(B)) is amended by striking out "court of bankruptcy under chapter XIII of the Bankruptcy Act" and inserting "court of the United States having jurisdiction over cases under chapter 13 of title 11 of the United States Code" in lieu thereof.

(b) Section 605(a)(1) of the Fair Credit Reporting Act (15 U.S.C. 1681(c)(a)(1)) is amended to read as follows:

"(1) cases under title 11 of the United States Code or under the Bankruptcy Act that, from the date of entry of the order for relief or

1. So in original.

the date of adjudication, as the case may be, antedate the report by more than 10 years."

Sec. 313. Section 201(e) of title 17 of the United States Code is amended by striking out the period at the end thereof and inserting ", except as provided under title 11." in lieu thereof.

Sec. 314. (a) Chapter 9 of title 18 of the United States Code is amended—

(1) by striking out "bankrupt" each place it appears and inserting "debtor" in lieu thereof;

(2) by striking out "bankruptcy proceeding" each place it appears and inserting "case under title 11" in lieu thereof;

(3) by striking out "bankruptcy law" each place it appears and inserting "provisions of title 11" in lieu thereof.

(b)(1) Title 18 of the United States Code is amended by striking out section 151 and inserting in lieu thereof the following:

"§151. Definition

"As used in this chapter, the term 'debtor' mean[1] a debtor concerning whom a petition has been filed under title 11.".

(2) The item relating to section 151 in the table of sections for chapter 9 of title 18 of the United States Code is amended by striking out "Definitions" and inserting "Definition" in lieu thereof.

(c) Section 152 of title 18 of the United States Code is amended by—

(1) striking out "the receiver," each place it appears and inserting "a" in lieu thereof; and

---

1. So in original.

(2) striking out "document affecting or relating to the property or affairs of a" and inserting in lieu thereof "recorded information, including books, documents, records, and papers, relating to the property or financial affairs of a".

(d)(1) Section 153 of title 18 of the United States Code is amended by striking out "receiver,".

(2) The heading for section 153 of title 18 of the United States Code is amended by striking out ", receiver".

(3) The item relating to section 153 in the table of sections for chapter 9 of title 18 of the United States Code is amended by striking out ", receiver".

(e)(1) Section 154 of title 18 of the United States Code is amended—

(A) by striking out "Whoever knowingly acts as a referee in a case in which he is directly or indirectly interested; or"; and

(B) by striking out "referee, receiver,".

(2) The heading for section 154 of title 18 of the United States Code is amended by striking out "referees and other".

(3) The item relating to section 154 in the table of contents for chapter 9 of title 18 of the United States Code is amended by striking out "referees and other".

(f)(1) Section 155 of title 18 of the United States Code is amended—

(A) by striking out the semicolon at the end of the first paragraph thereof and all that follows down through "Shall" and inserting in lieu thereof ", shall";

(B) by inserting "knowingly and fraudulently" immediately after "supervision,"; and

(C) by striking out ", bankruptcy or reorganization proceeding" and inserting "or case under title 11" in lieu thereof.

(2) The heading for section 155 of title 18 of the United States Code is amended by striking out "bankruptcy proceedings" and inserting in lieu thereof "cases under title 11 and receiverships".

(3) The item relating to section 155 in the table of sections for chapter 9 of title 18 of the United States Code is amended by striking out "bankruptcy proceedings" and inserting "cases under title 11 and receiverships" in lieu thereof.

(g) Section 1961(1)(D) of title 18 of the United States Code is amended by striking out "bankruptcy fraud" and inserting "fraud connected with a case under title 11" in lieu thereof.

(h) Section 2516(1)(e) of title 18 of the United States Code is amended by striking out "bankruptcy fraud" and inserting "fraud connected with a case under title 11" in lieu thereof.

(i) Section 3057 of title 18 of the United States Code is amended—

(1) by striking out "referee" each place it appears and inserting "judge" in lieu thereof; and

(2) by striking out "violations of the bankruptcy laws" and inserting "violation under chapter 9 of this title" in lieu thereof.

(j)(1) Section 2256 of title 28 of the United States Code is redesignated as section 3244 of title 18 of the United States Code.

(2) The table of sections of chapter 211 of title 18 of the United States Code is amended by adding at the end thereof the following:

"3244. Jurisdiction of proceedings relating to transferred offenders.".

(k) Section 3284 of title 18 of the United States Code is amended by striking out "bankrupt or other debtor" and inserting "debtor in a case under title 11" in lieu thereof.

(l) Section 6001(4) of title 18 of the United States Code is amended by inserting "a United States bankruptcy court established under chapter 6, "title 28, United States Code," immediately after "title 28, United States Code,".

Sec. 315. Section 485(f) of the Tariff Act of 1930 (19 U.S.C. 1485(f)) is amended by striking out "receiver or trustee in bankruptcy" and inserting "trustee in a case under title 11 of the United States Code" in lieu thereof.

Sec. 316. Section 302(l)(3) of the Automotive Products Trade Act of 1965 (19 U.S.C. 2022(l)(3)) is amended by striking out "bankruptcy" and inserting "cases under title 11 of the United States Code" in lieu thereof.

Sec. 317. Section 439A of part B of title IV of the Higher Education Act of 1965 (20 U.S.C. 1087-3) is repealed.

Sec. 318. Section 239(d) of the Foreign Assistance Act of 1961 (22 U.S.C. 2199(d)) is amended by striking out "the priority" and inserting "any priority" in lieu thereof.

Sec. 319. Section 2(1) of the National Labor Relations Act (29 U.S.C. 152(1)) is amended by striking out "bankruptcy" and inserting "cases under title 11 of the United States Code" in lieu thereof.

Sec. 320. Section 3(d) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 402(d)) is amended by striking out "bankruptcy" and inserting "cases under title 11 of the United States Code" in lieu thereof.

Sec. 321. (a) Section 4042 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1342) is amended in subsection (f)—

(1) by striking out "bankruptcy and of a court in a proceeding under chapter X of the Bankruptcy Act" and inserting "the United States having jurisdiction over cases under chapter 11 of title 11 of the United States Code" in lieu thereof; and

(2) by striking out "bankruptcy,".

(b) Section 4062(c)(2) of such Act (29 U.S.C. 1362(c)(2)) is amended—

(1) by striking out "the Bankruptcy Act" and inserting "title 11 of the United States Code" in lieu thereof; and

(2) by striking out "the subject of a proceeding under that Act" and inserting "a debtor in a case under chapter 7 of such title" in lieu thereof.

(c) Section 4068(c)(2) of such Act (29 U.S.C. 1368(c)(2)) is amended—

(1) by striking out "the case of bankruptcy or" and inserting "a case under title 11 of the United States Code or in" in lieu thereof; and

(2) by striking out "the Bankruptcy Act" and inserting "title 11 of the United States Code" in lieu thereof.

Sec. 322. (a) Section 3466 of the Revised Statutes of the United States (31 U.S.C. 191) is amended by adding at the end the following: "The priority established under this section does not apply, however, in a case under title 11 of the United States Code."

(b) Section 3467 of the Revised Statutes of the United States (31 U.S.C. 192) is amended by striking out "Every" and inserting in lieu thereof the following: "Except with respect to a trustee acting in accordance with the provisions of title 11 of the United States Code, every".

(c) Section 3469 of the Revised Statutes of the United States (31 U.S.C. 194) is repealed.

(d) Section 3473 of the Revised Statutes of the United States (31 U.S.C. 198) is repealed.

(e) Section 3474 of the Revised Statutes of the United States (31 U.S.C. 199) is repealed.

(f) The table of sections for title XXXVI of the Revised Statutes of the United States is amended by striking out the items relating to sections 3469, 3473, and 3474.

(g) Section 5256 of the Revised Statutes of the United States (45 U.S.C. 81) is amended by striking out "The laws of the United States providing for proceedings in bankruptcy shall not be held to apply to said corporation."

Sec. 323. Section 1 of the Act entitled "An Act to provide for the alteration of certain bridges over navigable waters of the United States, for the apportionment of the cost of such alterations between the United States and the owners of such bridges, and for other purposes", approved June 21, 1940 (54 Stat. 497; 33 U.S.C. 511), is amended by striking out "bankruptcy" and inserting "a case under title 11 of the United States Code" in lieu thereof.

Sec. 324. Subsection (a) of section 17 of the Act of March 4, 1927 (44 Stat. 1434; 33 U.S.C. 917(a)), is repealed.

Sec. 325. Section 213 of the Transportation Act, 1920 (40 U.S.C. 316), is amended by striking out "bankruptcy" and inserting "case under title 11 of the United States Code" in lieu thereof.

Sec. 326. Section 7 of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (49 Stat. 2039; 41 U.S.C. 41), is amended by striking out "bankruptcy" and inserting "cases under title 11 of the United States Code" in lieu thereof.

Sec. 327. Subsection (g) of section 733 of the Public Health Service Act (42 U.S.C. 294f) is repealed.

Sec. 328. Subsection (b) of section 456 of the Social Security Act (42 U.S.C. 656(b)) is repealed.

Sec. 329. Section 503 (42 U.S.C. 1473) of the Housing Act of 1949 is amended by striking out "This" and inserting "Except as provided in title 11 of the United States Code, this" in lieu thereof.

Sec. 330. Section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a)) is amended by striking out "bankruptcy" and inserting "cases under title 11, United States Code" in lieu thereof.

Sec. 331. Section 802(d) of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes", approved April 11, 1968 (82 Stat. 81; 42 U.S.C. 3602(d)), is amended by striking out "bankruptcy" and inserting "cases under title 11 of the United States Code" in lieu thereof.

Sec. 332. Section 17 of the Boulder Canyon Project Act (43 U.S.C. 617p) is amended by striking out "Claims" and inserting "Except as provided in title 11 of the United States Code, claims" in lieu thereof.

Sec. 333. Subsection (c) of section 3 of the Emergency Rail Services Act of 1970 (54 U.S.C. 662) is repealed.

Sec. 334. Title IX of the Merchant Marine Act, 1936 (46 U.S.C. 1241 et seq.), is amended by adding at the end thereof the following:

> "Sec. 908. (a) Notwithstanding any other provision of law, in any proceeding in a bankruptcy, equity, or admiralty court of the United States in which a receiver or trustee may be appointed for any corporation engaged in the operation of one or more vessels of United States registry between the United States and any foreign country, upon which the United States holds mortgages, the court, upon finding that it will inure to the advantage of the estate and the parties in interest and that it will tend

to further the purposes of this Act, may constitute and appoint the Secretary of Commerce as sole trustee or receiver, subject to the directions and orders of the court, and in any such proceeding the appointment of any person other than the Secretary as trustee or receiver shall become effective upon the ratification thereof by the Secretary without a hearing, unless the Secretary shall deem a hearing necessary. In no such proceeding shall the Secretary be constituted as trustee or receiver without the Secretary's express consent.

"(b) If the court, in any such proceeding, is unwilling to permit the trustee or receiver to operate such vessels in such service pending the termination of such proceeding, without financial aid from the Government, and the Secretary certifies to the court that the continued operation of such vessel is, in the opinion of the Secretary, essential to the foreign commerce of the United States and is reasonably calculated to carry out the purposes and policy of this Act, the court may permit the Secretary to operate the vessels subject to the orders of the court and upon terms decreed by the court sufficient to protect all the parties in interest, for the account of the trustee or receiver, directly or through a managing agent or operator employed by the Secretary, if the Secretary undertakes to pay all operating losses resulting from such operation, and comply with the terms imposed by the court, and such vessel shall be considered to be a vessel of the United States within the meaning of the Suits in Admiralty Act. The Secretary shall have no claim against the corporation, its estate, or its assets for the amount of such payments, but the Secretary may pay such sums for depreciation as it deems reasonable and such other sums as the court may deem just. The payment of such sums, and compliance with other terms duly imposed by the court, together with the payment of the operating losses, shall be in satisfac-

tion of all claims against the Secretary on account of the operation of such vessels".

Sec. 335. (a) Section 22(a) of the Organic Act of Guam (48 U.S.C. 1424(a)) is amended by inserting "and a bankruptcy court" immediately after "jurisdiction of a district court".

(b) Section 22(b) of such Act (48 U.S.C. 1424(b)) is amended by striking out "30 of the Bankruptcy Act of July 1, 1898, as amended (title 11, U.S.C., sec. 53), in bankruptcy cases;" and inserting "2075 of title 28, United States Code, in cases under title 11, United States Code," in lieu thereof.

Sec. 336. (a) Section 22 of the Revised Organic Act of the Virgin Islands (48 U.S.C. 1612) is amended by inserting "and a bankruptcy court" immediately after "jurisdiction of a district court".

(b) Section 25 of such Act (48 U.S.C. 1615) is amended by striking out "30 of the Bankruptcy Act in bankruptcy cases" and inserting "2075 of title 28, United States Code, in cases under title 11, United States Code" in lieu thereof.

Sec. 337. (a) Section 20c of the Interstate Commerce Act (49 U.S.C. 20c) is amended by striking out "bankruptcy" and inserting "a case under title 11 of the United States Code" in lieu thereof.

(b) Section 213(a)(3) of such Act (49 U.S.C. 313(a)(3) is amended—

(1) by striking out "bankruptcy from" and inserting "a case under title 11 of the United States Code from" in lieu thereof; and

(2) by striking out "bankruptcy" and inserting "such case" in lieu thereof.

(c) Section 323 of such Act (49 U.S.C. 922a) is amended by striking out "bankruptcy" and inserting "a case under title 11 of the United States Code" in lieu thereof.

Sec. 338. (a) Section 8339 of title 5 of the United States Code is amended—

(1) by inserting in subsection (f), immediately after "subsections (a)-(e)", the following: "and (o)".

(2) by inserting in subsection (i), immediately after "subsections (a)-(h)", the following: "and (o)";

(3) by inserting in subsections (j) and (k)(1), immediately after "subsections (a)-(i)" each time it appears, the following: "and (o)";

(4) by inserting in subsection (l), immediately after "subsections (a)-(k)," the following: "and (o)";

(5) by inserting in subsection (m), immediately after "subsections (a)-(e)", the following: "and (o)";

(6) by adding at the end thereof the following: "(o) The annuity of an employee who is a bankruptcy judge is computed with respect to service after March 31, 1979 and before April 1, 1984, as a bankruptcy judge and his military service (not exceeding five years) creditable under section 8332 of this title by multiplying 2½ percent of his average annual pay by the years of that service.".

(b) The first sentence of section 8334(c) of title 5, United States Code, is amended by adding at the end thereof the following new schedule:

"Bankruptcy judge—2½ — August 1, 1920 to June 30, 1926.
3½ — July 3, 1926, to June 30, 1942.
5 — July 1, 1942, to June 30, 1948.
6 — July 1, 1948, to October 31, 1956.

6½ — November 1, 1956, to December 31, 1969.
7 — After January 1, 1970.".

(c) Section 8341 of title 5, United States Code, is amended—

(1) by inserting in subsection (b)(1), immediately after "section 8339(a)-(i)", the following: "and (o)"; and

(2) by striking out of subsection (d) "section 8339(a)-(f) and (i)" and inserting in lieu thereof the following: "section 8339(a)-(f), (i) and (o)".

(d) Section 8344(a)(A) of title 5, United States Code, is amended by striking out "and (i)" and inserting in lieu thereof "(i), and (o)".

(e) Section 8331 of title 5, United States Code, is amended—

(1) by striking out "and" at the end of paragraph (20);

(2) by striking out the period at the end of paragraph (21) and inserting in lieu thereof "; and"; and

(3) by adding at the end thereof the following:

"(22) 'bankruptcy judge' means an individual appointed under section 34 of the Bankruptcy Act (11 U.S.C. 62) or under section 404(d) of the Act adding this paragraph—

"(A) who is serving as a United States bankruptcy judge on March 31, 1984, and that has agreed by filing a notice of such agreement with the President, the Senate, and the Director of the Administrative Office of the United States Courts, to accept

an appointment as a judge of a United States bankruptcy court established under section 201 of this Act but that is not appointed by the President as a judge of such court; or

"(B) whose service as a United States bankruptcy judge during the transition period is terminated by reason of death or disability".

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CLERK

No. 83-413

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CONTINENTAL AIRLINES, INC.,
Petitioner,

v.

FRED ZIMMERMAN, Trustee of
Ludwig Honold Manufacturing Co., Debtor,
Respondent.

WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONSE TO PETITION FOR CERTIORARI

Gary M. Schildhorn
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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Does the Bankruptcy Court have jurisdiction to determine a dispute between the Trustee for the Debtor and the defendant, arising out of a written contract which contains a provision in which the Debtor and defendant agreed to submit to arbitration disputes arising out of said contract?

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 712 F.2d 55 (3d Cir. 1983). The opinion of the United States Bankruptcy Court for the Eastern District of Pennsylvania is reported at 22 B.R. 436 (Bankr. E.D. Pa. 1982).

JURISDICTION

Respondent adopts Petitioner's statement of "Jurisdiction".

STATUTORY PROVISION INVOLVED

Respondent adopts Petitioner's statement of "Statutory Provisions Involved".

COUNTERSTATEMENT OF THE CASE

On November 11, 1981, an involuntary petition in bankruptcy was filed against Ludwig Honold Manufacturing Company ("Ludwig Honold"). The case was converted to a Chapter 11 proceeding and subsequently Fred Zimmerman, the plaintiff herein, was appointed as Trustee of the Debtor.

Included among the assets of the Debtor's estate was an account receivable against Continental Airlines, Inc. ("Continental"). The account receivable arose out of a contract entered into between Ludwig Honold and Continental pursuant to which Continental agreed to purchase from Ludwig Honold four "plane mate" vehicles (the "Contract").

Prior to the delivery of the third "plane mate" vehicle by Ludwig Honold to Continental, Continental, in various documents, agreed to waive any rights it may have had under the Contract to assert liquidated damages for late delivery of any of the "plane mates". Subsequently, Ludwig Honold completed its obligation under the Contract and demanded the Contract balance. Despite its representation to the contrary, Continental refused to pay the contract balance, asserting a right to claim liquidated damages.

On April 20, 1983, Fred Zimmerman (the "Trustee'), commenced an adversary proceeding against Continental in the Bankruptcy Court seeking judgment against Continental for all sums due and owing under the Contract. Continental did not file an Answer to the Complaint but rather filed an Application for Stay Pending Arbitration. The Contract between Ludwig Honold and Continental contained a provision requiring the arbitration of all

controversies arising under the Contract. Continental relied on this provision and on the Federal Arbitration Act, 9 U.S.C. Section 3, in its Application for Stay Pending Arbitration. The Trustee filed a response to Continental's Application for Stay, admitting the existence of the arbitration provision but denying that the arbitration provision contained in the Contract was binding on the Trustee. The Trustee further denied that the Federal Arbitration Act was applicable to the bankruptcy proceeding.

After argument and the submission of briefs, Bankruptcy Judge Goldhaber issued an Order and accompanying Opinion denying the Application of Continental. The Court reasoned that Congress enacted 28 U.S.C. Section 1471, which broadens the jurisdiction of the Bankruptcy Court, with the intention of insuring prompt administration of bankrupt estates. The effective and prompt resolution and

administration of issues relating to and arising out of a bankruptcy proceeding were controlling factors in the Bankruptcy Judge's decision to deny the stay of proceedings pending arbitration.

Continental filed a timely Notice of Appeal to the District Court. Thereafter, counsel for both parties executed a Stipulation for Direct Appeal to the United States Court of Appeals for the Third Circuit. In an Opinion filed July 11, 1983, the Court of Appeals affirmed the Order of the Bankruptcy Court.

The Court of Appeals analyzed the Congressional policy supporting the broad jurisdictional grant for bankruptcy courts contained in the Bankruptcy Reform Act of 1978 and noted the special place held by bankruptcy proceedings in the Federal judicial system. The Court concluded:

> Therefore, because of the importance of bankruptcy proceedings in general, and the need for the expeditious resolution of bankruptcy matters in particular, we hold that the intentions of Congress will be better realized if the Bankruptcy Reform Act is ready to impliedly modify the Arbitration Act.
>
> 712 F.2d at 59 (App. at A-10)

The Court of Appeals accordingly held that the Bankruptcy Court had the discretionary power to deny a stay pending arbitration, and no abuse of discretion occurred.

REASONS FOR DENYING CERTIORARI

I. The Institution Of Bankruptcy Proceedings By Petitioner Has Rendered Moot The Issue Presently Before This Court.

The question presented for review concerns the applicability of a forum selection clause contained in a commercial contract to a trustee in bankruptcy. The issue arose when the Trustee of Ludwig Honold sought to collect an account receivable from Continental

by instituting an action in the Bankruptcy Court. Subsequent to the filing of the Writ of Certiorari, Continental filed its own voluntary petition in bankruptcy pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. Upon the filing of this petition, an automatic stay was imposed by Section 362 of the Bankruptcy Code prohibiting any action to collect a pre-petition indebtedness owed by Continental. It is manifest that because the Trustee is enjoined from pursuing his suit against Continental, the question concerning the proper forum for that suit is moot.

II. The Decision of the Third Circuit Court Of Appeals Does Not Conflict With An Opinion Of Any Other Circuit Court Of Appeals.

One of the factors to be considered by this Court when determining whether to grant a writ of certiorari is the existence of a conflict among the decisions of the Circuit

Courts of Appeals. See U.S. Sup.Ct. Rule 17, 28 U.S.C.A. (Supp. 1983); Rice v. Sioux City Memorial Park Cemetery, Inc., 75 Sup.Ct. 614, 619-20 (1955); Layne & Bowler Corporation v. Western Well Works, Inc., 43 Sup.Ct. 422 (1923). There has been no reported decision from any Circuit Court of Appeals which conflicts with the holding of the Third Circuit below.

Continental argues that certiorari should be granted because of a conflicting decision of a Bankruptcy Appellate Panel of the Ninth Circuit. Such a holding would significantly and imporperly expand the scope and number of cases presented for review. Moreover, the holding of the Bankruptcy Appellate Panel in In re Morgan, 28 BR 3 (Bankr. 9th Cir. 1983), appeal docketed, No. 83-1818 (9th Cir., March 22, 1983) is not in conflict with the decision of the Third Circuit. In Morgan, the Court held that a debtor-in-possessio

and not a trustee, was bound by an arbitration provision contained in a pre-petition contract where the debtor-in-possession sought to enforce rights under the contract. The Court further found that the debtor-in-possession was bound by the doctrine of res judicata. Id. at 5.

The decision of the Third Circuit is in harmony with recent decisions of the district courts and the bankruptcy courts. In In re Braniff Airways, Inc., 3 BLR 83,157 (Bankr. N.D. Tex. 1983), the Court held that the Congressional policy of giving the Chapter 11 debtor an unhampered chance for reorganization as evidenced by the grant to bankruptcy courts of exclusive jurisdiction over a bankruptcy case in 28 U.S.C. Section 1471, the removal provisions of 28 U.S.C. Section 1478, and the automatic stay provisions in Bankruptcy Code Section 362, override the Arbitration Act particularly where resolution of the issues will determine which creditors are entitled to share in the estate and in what order of

priority. See also, In re Sterling Mining Company, Inc., 21 BR 66 (Bankr. W.D. Va. 1982); In re Cross Electric Co., 9 BR 408 (Bankr. W.D. Va. 1981) (holding that the United States Arbitration Act is not applicable to bankruptcy proceedings).

In Coar v. Brown, 29 BR 806 (D.C. N.D. Ill. 1983), the District Court was called upon to resolve the interplay between the Bankruptcy Code and the United States Arbitration Act. Although the Court recognized the strong federal policy favoring arbitration of disputes, the interests represented by the trustee in bankruptcy were paramount and the Court therefore refused to stay the proceeding pending arbitration.

Continental cites two decisions of lower courts as being in conflict with the decision of the Third Circuit. The first cited case, In re Hart Ski Manufacturing Co., 18 BR 154 (Bankr. D. Minn.), aff'd, 22 BR 763 (D. Minn. 1982), is inapplicable because the Court was

not faced with and did not decide the issue of the competing policies which support the Federal Arbitration Act and the Bankruptcy Code. The second case, Barber-Greene Co. v. Zeco Co., 17 BR 248 (Bankr. D. Minn. 1982), supports the decision of the Third Circuit below in that the Court recognized that it was not bound by the Federal Arbitration Act but rather had discretion as to whether to assume jurisdiction over the controversy.

Prior to the enactment of the Bankruptcy Code, the jurisdiction of the bankruptcy courts was greatly restricted. However, decisions under the former Bankruptcy Act were in accord with the decision of the Third Circuit below. See, In re F & T Contractors, Inc., 649 F.2d 1229, (6th Cir. 1981); Johnson v. England, 356 F.2d 44 (9th Cir.) cert. den., 384 U.S. 961 (1966); Allegaret v. Perot, 548 F.2d 432 (2d Cir.), cert. den., 432 U.S. 910 (1977).

In other appropriate circumstances, courts have also refused to compel arbitration under an arbitration clause. In Wilko v. Swan, 346 U.S. 427 (1953), this Court held that an action under the Securities Act of 1933 would not be stayed pending arbitration despite the existence of an arbitration clause and the United States Arbitration Act. In American Safety Equipment Corporation v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968), the Court held that an action for a delcaratory judgment to void a license agreement as violative of the Sherman Anti-Trust Act would not be stayed, despite the existence of an arbitration clause and the United States Arbitration Act.

Finally, the decision below is not in conflict in principle with a Second Circuit decision decided under the Bankruptcy Code, as contended by Continental. See, In re Petrusch, 667 F.2d 297 (2nd Cir. 1981), cert. den., 456 U.S. 974 (1982). The Petrusch case is

distinguishable on its facts and therefore inapplicable to the case at bar. At issue in Petrusch was an important substantive right, namely the right to picket. Id. at 298.

Congress protected this substantive right by withdrawing from the jurisdictional powers of any United States court the power to issue injunctions restraining picketing. See 29 U.S.C.A. Sec. 104 (1973). The Debtor, in Petrusch, sought an Order from the Bankruptcy Court enjoining the picketing of his premises as a violation of the automatic stay provision of the Bankruptcy Code. The Circuit Court held that neither the legislative history nor the provisions of the Bankruptcy Code could be construed so as to repeal this fundamental substantive right. In re Petrusch, 667 F.2d at 299-300. No such substantive right is at issue in the instant proceeding.

CONCLUSION

For the reasons stated, a writ of certiorari should not issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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